Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

Nos. 79-377, 79-378 and 79-379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DOW JONES & COMPANY, INC.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

NATIONAL NEWSPAPER ASSOCIATION

ASSOCIATION OF AMERICAN PUBLISHERS, INC.

RECORDING INDUSTRY ASSOCIATION OF AMERICA

Petitioners,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

REPLY TO BRIEFS IN OPPOSITION

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December, 1979

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The briefs submitted by the Government and by two private parties in opposition to petitions for writ of certiorari of Dow Jones & Company, Inc., in No. 79-377 and petitioners in Nos. 79-378 and 79-379, underscore the importance of the issues presented, and emphasize the need for review by the Court of the decision below.

In particular, the Government's brief submitted in response to a communication from the Clerk confirms the continuing view of the Postal Service that:

(a) The language and legislative history of the Postal Reorganization Act of 1970, 39 U.S.C.

101 *et seq.*, have been misconstrued by the court of appeals (p. 9);

(b) The insistence of the court below upon the methodology it has prescribed deprives the Postal Service and the Postal Rate Commission of the pricing flexibility that Congress intended them to have (p. 10; 13);

(c) The court of appeals approach, "unlike that of the Commission rejected in *NAGCP I*, would not maximize the efficient allocation of resources" (p. 10, n. 4); and

(d) "Barring a complete change of course by the court of appeals, this Court is the only forum for judicial relief" (pp. 10-11).

These elements insistently call for review by this Court.

Nevertheless, on the assertion that the rates themselves are lawful, the Court is advised that "the government therefore cannot acquiesce in petitioners' suggestion that this Court review and, ultimately, overturn them." (p. 13). But, the questions of whether this Court should review the decision below, and whether it should ultimately reverse that decision and overturn the rates are separate and distinct. Given the manifest importance of the issues raised by the petitions, review by this Court which will resolve the Postal Service's present intolerable dilemma is undeniably in the public interest. The Postal Service should no longer be confronted with the two "equally unattractive alternatives" described in the Government's brief — "setting rates under principles that it finds unacceptable, or else setting rates that will almost certainly be struck down by the court of appeals" thereby jeopardizing the entire multi-billion dollar postal rate scheme (p. 13).

Moreover, although it is not necessary to establish at this stage of the proceedings that the postal rates presently under review are unlawful and should be set aside, the Government's contention that these rates are "lawful" is erroneous for two separate reasons:

First, the assumption that the Postal Service would have *discretion* to adopt the costing scheme which was *required* by the court of appeals is erroneous because "Congress envisaged only two types of postal costs . . ." (p. 9; see also p. 7 and the petition in No. 79-378, pp. 18-26 which the Postal Service endorses), rather than three segments which were in fact utilized in determining these rates (p. 8).

Second, the rates established in this proceeding are not lawful, for they were formulated under the compulsion of *NAGCP I*, rather than on the basis of the judgment of those expert officials to whom the responsibility was committed by Congress. That a decision which results from such a "compelled course" (p. 11) is not "lawful" even if the result could otherwise be sustained is a familiar and fundamental principle of administrative law which received its classic, and since unquestioned articulation over 35 years ago in *SEC v. Chenery Corp.*, 318 U.S. 80, 88:

> If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of

affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

Respectfully submitted,

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